No. 73-1595

In the Supreme Court of the United States

OCTOBER TERM, 1973

COLONIAL PIPELINE COMPANY,
Appellant,

v.

E. LEE AGERTON, COLLECTOR OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS ON BEHALF OF THE COLLECTOR OF REVENUE

Appellee, through undersigned counsel of record, respectfully moves that this appeal be dismissed on the following grounds:

No substantial federal question is raised by the facts of this case. The corporation franchise levied by the Louisiana Legislature is imposed upon the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant, or other property in Louisiana, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the state. This court has held such local incidents to be subject to the constitutional exercise of the state taxing power without violating the Commerce Clause limitation of the Federal Constitution.

STATEMENT OF THE CASE

This suit arose from a dispute between the Collector of Revenue, (hereinafter called Collector) and Colonial Pipeline Company, (hereinafter called Colonial) concerning Colonial's 1970 and 1971 tax liability for the Louisiana Corporation Franchise Tax imposed by La. Rev. Stat. 47:601, as amended by Act 325 of 1970. Pursuant to La. Rev. Stat. 47:1576 Colonial seeks refund of the taxes paid under protest.

Colonial, a foreign corporation, which voluntarily qualified to do business in Louisiana, owns and operates a petroleum pipeline system extending from Houston, Texas, through Louisiana to the New York City area. Of the total pipeline mileage owned by Colonial, approximately 258 miles are located in Louisiana.

In addition, Colonial owns and operates pumping stations, tank farms and related facilities which are used to facilitate the interstate shipment of petroleum products through the pipeline. Colonial does not engage in any intrastate shipment of petroleum products in Louisiana; however, to maintain and operate the line and facilities, Colonial does employ approximately 25 to 30 persons in this state.

The Collector contends that Colonial is liable for the Louisiana Corporation Franchise Tax and that the imposition of this tax upon Colonial is constitutionally permissible under the Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution. Colonial, however, protests this imposition of the tax on the grounds that La. Rev. Stat. 47:601 as amended by Act 325 of 1970, was not intended by the Louisiana Legislature to impose a franchise tax on a corpo-

ration engaging exclusively in interstate commerce, and that if La. Rev. Stat. 47:601 does levy such a tax, then it violates the Commerce Clause of the United States Constitution, the due process clause of the Fourteenth Amendment of said Constitution and Article 1, Section 2 of the Louisiana Constitution.

The trial court held that the statute in question imposes a tax upon the privilege of doing business in the state and that since Colonial was a foreign corporation doing only interstate business in Louisiana, to impose the tax upon Colonial would be to exact a tax for the privilege of doing interstate business, which application would violate the Commerce Clause. The court of appeals affirmed the district court's decision.

The Louisiana Supreme Court reversed, holding the application of the tax to be a constitutional exercise of the State of Louisiana's taxing power not unconstitutional under the Commerce Clause of the Federal Constitution and this appeal was taken.

ARGUMENT

The issue in this case is the constitutionality of the imposition of the Louisiana Corporation Franchise Tax imposed by La. Rev. Stat. 47:601, as amended by Act 325 of 1970, upon Colonial, in light of the Commerce Clause of the Federal Constitution.

La. Rev. Stat. 47:601 provides:

"§ 601. Imposition of tax

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in

this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

"(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

"(2) The exercising of a corporation's charter or the continuance of its charter within this state.

"(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

"It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers,

rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

"As used herein the term 'domestic corporation' shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term 'foreign corporation' shall mean and include all such business organizations as hereinbefore described in this paragraph which are organized under the laws of any other state, territory or district, or foreign country."

Amended by Acts 1970, No. 325, § 1, emerg. eff. July 13, 1970 at 2:15 P.M.

The appellant argues in this case that the above franchise tax is imposed solely upon the privilege of doing interstate business as applied to appellant. However, the Louisiana Supreme Court at 289 So. 2d. 93, 96-101, construed the statute in the following manner:

"The statute as amended in 1970 imposes a corporation franchise tax upon, pertinently, every foreign corporation (and every domestic corporation as well) exercising its charter, authorized to do or doing business, or owning or using any part or all of its capital or plant, in the State of Louisiana. The tax is due and payable on any one or all of three alternative incidents:

"a) doing business in Louisiana in a corporate form

"b) the exercising of a corporation's charter or the continuance of its charter within the state and

"c) the owning or using any part or all of its capital, plant or other property in Louisiana in a corporate capacity.

"The thrust of the statute is to tax not the interstate business done in Louisiana by a foreign corporation, but the doing of business in Louisiana in a corporate form, including

> 'each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations . . .'

* * * *

"Louisiana's corporation franchise tax statute, as amended by Act 325 of 1970, and as applied to foreign corporations doing only interstate business in Louisiana, taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this state, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the State.

"The corporation, including the foreign corporation doing only interstate business in Louisiana, enjoys under our laws many privileges separate and apart from simply doing business, such for instance as the legal status to sue and be sued in the Courts of our State, continuity of business without interruption by death or disso-

lution, transfer of property interests by the disposition of shares of stock, advantages of business controlled and managed by corporate directors, and the general absence of individual liability, among others.

"That the corporation enjoys power and privileges not possessed by individuals or partnerships was long ago recognized by this Court. Conway v. Lane Cotton Mills Co., 178 La. 626, 152 So. 312 (1933).

"The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing interstate business in the State, does not in our view detract from the fact that the local incident taxed is the form of doing business rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause.

"The Statute does not discriminate between foreign and local corporations, being applicable, as it is, to both. Nor do we believe that the State's exercise of its power by this taxing statute is out of proportion to Colonial's activities within the state and their consequent enjoyment of the opportunities and protection which the state has afforded them.

"Furthermore we believe that the State has given something for which it can ask return. The return, tax levy in this case, is an exaction which the State of Louisiana requires as a recompense for its protection of lawful activities carried on in this state by Colonial, activities which are incidental to the powers and privileges possessed

by it by the nature of its organization, here, as in *Memphis Natural Gas*, the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of their pipeline system throughout the 258 miles of its pipeline in the State of Louisiana.

"We therefore find R.S. 47:601 et seq. to be a Constitutional exercise of the State of Louisiana's taxing power not unconstitutional under the Commerce Clause of the Federal Constitution."

Thus, the Louisiana Supreme Court has construed the franchise tax to be imposed upon local incidents other than the simple privilege of doing interstate business in Louisiana. Clearly, Colonial is subject to the tax on the basis of each incident. Colonial has qualified to do business in Louisiana in the corporate form. It is exercising its corporate charter within the state, and it owns and is using part of its capital, plant and property here in the corporate capacity.

This court has long recognized that a nondiscriminating, properly apportioned corporate franchise tax may be imposed upon foreign corporations when the tax is imposed upon local incidents that provide a taxable nexus with the state. *Memphis Natural Gas Company v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948); *Southern National Gas Corp. v. Alabama*, 301 U.S. 148, 57 S.Ct. 695, 81 L.Ed. 970 (1937); *Stone v. Interstate Natural Gas Co.*, 103 F.2d 544 (5th Cir., 1939) affirmed 308 U.S. 522, 60 S.Ct. 292, 84 L.Ed. 442 (1940); *Wisconsin & Michigan Steamship Company v. Corporation and Securities Commission*, 371 Mich. 61, 123 N.W. 2d 258 (S.Ct.

Mich. 1963), Writs denied 376 U.S. 912, 84 S.Ct. 668, 11 L.Ed. 2d 610 (1964), petition for rehearing denied, 376 U.S. 966, 84 S.Ct. 1123, 11 L.Ed. 2d 984 (1964). See also, *Great Lakes Pipeline Co. v. Oklahoma Tax Commission*, 231 P.2d 655 (S.Ct. Okla. 1951); *Texas Gas Transmission Corp. v. Atkins*, 270 S.W. 2d 384 (S.Ct. Tenn. 1954); *Mid Valley Pipeline Company v. King*, 221 Tenn. 724, 431 S.W. 2d 277 (1968), appeal dismissed for lack of federal question by the U. S. Supreme Court, 393 U.S. 321, 89 S.Ct. 556, 21 L.Ed. 2d 517 (1969); *Roadway Express, Inc. v. Director of Taxation*, 50 N.J. 471, 236 A. 2d 577 (1967), appeal dismissed for lack of a substantial federal question by the U.S. Supreme Court, 390 U.S. 745, 88 S.Ct. 1443, 20 L.Ed. 2d 276 (1968).

It is clear that under Louisiana law Colonial exercises rights, privileges, or immunities enjoyed in the state as an incident to and by virtue of the powers and privileges acquired by the corporate form of existence in this state. Colonial has qualified to carry on or do business in the state in the corporate form. Colonial is exercising its charter in the state. Colonial owns and is using part of its capital, plant and property in this state in the corporate capacity. In exchange for granting these rights, privileges, and immunities to Colonial, the tax is imposed, not upon Colonial's interstate business, but upon the rights, privileges and immunities granted by Louisiana law. The state has granted something for which it seeks return. The return is this franchise tax.

Appellee respectively submits that appellant's argument that the tax is imposed upon the privilege to

do interstate business is frivolous and does not present a substantial federal question to this court. On the contrary, the Louisiana Corporation Franchise Tax is imposed upon Colonial's local incidents which emanate from the State of Louisiana.

CONCLUSION

It is respectfully submitted that the Louisiana Corporation Franchise Tax as applied to Colonial is a valid exercise of the State of Louisiana's taxing power and is not unconstitutional under the Commerce Clause of the Federal Constitution.

It is respectfully submitted that the appeal in this case should be dismissed.

Respectfully submitted,

CHAPMAN L. SANFORD and
WHIT C. COOK, II
Department of Revenue,
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Baton Rouge, Louisiana 70821.

Attorneys for Appellee.

PROOF OF SERVICE

The undersigned, attorney for E. Lee Agerton, Collector of Revenue, defendant-appellee herein, and a member of the Bar of the Supreme Court of the United States hereby certifies that on the _____ day of May, 1974, I served a copy of the foregoing Motion to Dismiss on Colonial Pipeline Company, plaintiff-appellee herein, by mailing a copy of the same in an addressed envelope with postage prepaid to its counsel of record, R. Gordon Kean, Jr., of Sanders, Miller, Downing & Kean, Post Office Box 1588, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this _____ day of May, 1974.

CHAPMAN L. SANFORD and
WHIT M. COOK, II

B-4702, 5-74